No. 163 and 247.

Brief of Childers & Q.

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SUPREME COURT

Filed Feb. 19, 1901.

UNITED STATES.

OCTOBER TERM, 1900.

No. 163

Browne, Manzanares & Company, Plaintiffs in error,
vs.
Francisco Chaves, Second, Defendant in error.

Filed December 11, 1899.

No. 247

Browne, Manzanares & Company, Appellants,
vs.
Francisco Chaves, Second, Appellee.

Filed April 20, 1900.

In error to and appeal from the Supreme Court of the Territory of New Mexico.

Brief of Plaintiffs in Error and Appellants.

WILLIAM B. CHILDERS,
Attorney for Plaintiffs in Error, and Appellants.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1900.

No. 165.

Browne, Manzanares & Company,
Plaintiffs in error.
vs.
Francisco Chaves, Second,
Defendant in error.
Writ of Error.

No. 247

Browne, Manzanares & Company,
Appellants.
vs.
Francisco Chaves, Second,
Appellee.
Appeal.

STATEMENT OF THE CASE.

This cause is here both by writ of error and appeal. We apprehend, however, that it is here properly only by appeal, and that as there was no trial by jury, and the issues were only questions of law de-

termined by the trial court on demurrer, that the writ of error will be dismissed and the cause held on appeal alone.

Stringfellow v. Cain, 99 U. S., 610.

The questions in the case arise on a scire facias to revive a judgment. On the 7th day of October, A. D., 1885, the firm of Browne, Manzanares & Co., composed of L. P. Browne, since deceased, and F. A. Manzanares, recovered judgment against Francisco Chavez, 2nd., in the District Court for Bernalillo County for the sum of $4,170, damages and costs. The judgment remaining unsatisfied, on the 30th day of September, 1895, a writ of scire facias was sued out, which was returned personally served on the same day. On the 7th day of October, 1895, the defendant entered his appearance to the writ, and subsequently filed two pleas. The first plea suggested the death of L. P. Browne, and prayed judgment if the said writ ought not and should not on that account issue or the said cause be revived. The second plea set up that the judgment was not in force, under the provisions of Chapter LIII of the Session Laws of New Mexico of the year 1891, when the writ was issued, because it was recovered nearly ten years before the writ was sued out. To these pleas the plaintiff in error, Francisco A Manzanares, surviving partner of the firm of Browne & Manzanares, demurred, alleging that the judgment was rendered in favor of the firm of Browne & Manzanares, composed of himself and L. P. Browne, in the lifetime of the latter, and that as surviving partner he had a

right to sue out said writ to revive said judgment; and, as to the second plea, that the statute did not bar the judgment in seven years, and that this proceeding was not the bringing of a new suit, but was a proceeding in the original suit in which the judgment was rendered. These are the questions arising on the record.

In the Supreme Court of the Territory of New Mexico the following errors were assigned

"Now comes the plaintiffs in error and assign as error, committed by the Court in the trial of said cause by the Court below, the following, to-wit:

"First. The Court committed error in overruling plaintiff in error's demurrer to the two pleas filed by defendant in error to the writ of scire facias sued out in said cause."

Appellant assigns as error in this Court, the following:

ASSIGNMENT OF ERRORS.

First. The Supreme Court of the Territory committed error in failing to reverse the action and judgment of the District Court in overruling the demurrer of the appellant to the defendant's plea to the writ, that because since the rendition of the judgment, L. P. Browne, one of the judgment plaintiffs mentioned in the writ, had died. (Record, pages 5 and 6.)

Second. Because the Supreme Court of the Territory committed error in refusing to reverse the judgment of the District Court in overruling the plaintiff's demurrer to the second plea of the defendant to the writ, that the same was barred by the statute of limitations of seven years. (Record, pages 5 and 6.)

POINTS AND AUTHORITIES.

I.

The judgment was rendered in favor of a co-partnership, and the surviving partner, as such, or in the name of the firm, can maintain any suit or other proceeding in relation thereto, and the demurrer should have been sustained to the first plea.

All actions relating to partnership affairs must be brought by the surviving partners. If pending the action a partner dies, it does not abate, but death is suggested and the suit proceeds.

17 Am. & Eng. Ency of Law, 1172-3. (First Ed.)

15 Ency of Pl. & Pr., 883.

Bischoffsheim v. Baltzer, 20 Fed. Rep., 890.

Suydam v. Ewing, 2 Blatchf., 359; 23 Fed. Cases, No. 13,655.

Parsons on Partnership, 440.

"The plaintiff in a cire facias will ordinarily be the same person who was plaintiff in the original judgment, and in such case his capacity to sue out the writ will be governed by the same rules which determine the capacity of persons to maintain other species of actions."

1 Black on Judgments, Sec. 488.

If sued out in the name of the intestate, the writ may be amended by substituting the name of the administrator.

Challenor v. Niles, 78 Ill., 78.

The judgment, as well as the writ, showed that it

Note.—In the district court two judgments were entered, the first of which (Record, p. 7) overruled the plaintiff's demurrer as a whole; but this was afterwards set aside, (Record, p. 8), and on further hearing the demurrer was overruled only so far as it applied to the second plea. (Record, p. 8.) Thus it will be seen that the only action of the courts below to be reviewed, is as to the second plea, and that what appears herein under Point I, on pages 4, 5 and 6, is superfluous. The opinion of the supreme court of New Mexico recognizes this to be the fact. (Record, p. 12.) This was discovered too late to have the brief reprinted.

was rendered in favor of a co-partnership, and the plea alleging that one of the partners was dead simply amounted to the suggestion of the death of that partner, the proceedings would go one in the name of the survivor. There would be no necessity for a revivor, or the substitution of the personal representa tive of the deceased partner. The suit did not abate by the death and the personal representative of the deceased partner is not a proper party.

The first plea, as a plea in abatement, alleges no reason why the writ should not issue. It is not good as a plea in abatement. Upon the death of a party being suggested, if the right of action survives to the remaining parners, the action may proceed. The writ at the time the demurrer was overruled, was so proceeding.

"Where there are several plaintiffs or defendants to an action, and one of them dies, or his powers as a personal representative cease, if the right of action survives to or against the remaining parties, the action may proceed, the death of the party or the cessation of his powers being stated on the record."

Compiled Laws of N. M. (1897) Sec. 3089.
5 Ency of Pleading & Practice, 814.

The matter alleged in the first plea, even if a good defense to the writ, was not under oath, as required by the statute.

"All pleas in abatement, except pleas to the jurisdiction as to the subject, shall be under oath." Sec. 2973 of the Compiled Laws of N. M., (1897.)

The sections of the Compiled Laws above quoted, as to the survival of actions, where one of two or more plaintiffs die, and pleas in abatement,

were in force when this cause was heard in the Court below. They are merely declaratory statements of the common law. This proceeding would have survived under common law principles. The common law was adopted in New Mexico as the rule of practice and decision in 1876.

Walker vs. New Mexico & Southern Pac. Rd. Co., 165 U. S., 604-5.

In Tidd's Practice, it is stated: "When there were two or more plaintiffs in a personal action, the death of one or more of them, pending the suit, would formerly in some cases have abated it. But now, by the statute 8 & 9 W. III, c. 11, Sec. 7, 'if there be two or more plaintiffs or defendants, and one or more of them die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed, at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants.'"

2 Tidd's Practice, p. 1119.

This statute became a part of the common law of New Mexico. This statute is recognized, and is the general practice in the United States.

5 Ency. of Pleading & Practice, 814.

II.

The vital question in this case, the one upon which both the District and Supreme Courts

of the Territory decided the case, is whether or not the Act of 1891, (Section 2914 of the Compiled Laws of 1897) is a bar to the revival of this judgment by scire facias.

This act was passed as a substitute for section 1861 of the Compiled Laws of New Mexico, 1884. The statute at the time of the passage of the substitute was as follows:

"Sec. 1860. The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided.

"Sec. 1861. Actions upon any judgment of any Court of record of any state or territory of the United States, or the federal courts of the United States, within fifteen years."

Sections 1860 and 1861 of the Compiled Laws of 1884.

The act of 1891 was a substitute for the last section above quoted and must be read in connection with the preceeding section, and they were carried into the compilation of 1897, and are as follows:

"Sec. 2913. The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue and not afterwards, except when otherwise specially provided.

"Sec. 2914. Actions founded upon any judgment of any Court of the Territory of New Mexico may be brought within seven years from and after the rendition of such judgment, and not afterward, and actions founded upon any judgment of any court of record of any other territory or state of the United States, or of the federal courts, may be brought within seven years from and after the rendition of such judgment, and not afterward: Provided, That actions may be brought upon any existing judgment, which, but for this proviso, would be barred within

one year from and after the passage of this act, and not afterward; and all actions upon such judgments not commenced within the time limited by this act shall be forever barred."

Sections 2913 and 2914, Compiled Laws of 1897 Acts of 1891, page 114-15.

Stern v. Bates, 9 N. M. Rep., 286.

Appellant contends, that a judgment at Common Law was not barred, but remained in full force and effect for twenty years after rendition. Executions could be issued at any time, within that period, provided one execution had been previously issued within a year and a day, and in that case there was no presumption of satisfaction within a less period of time than twenty years. As Blackstone puts it: "But all these writs of execution must be sued out within a year and a day after the judgment is entered; otherwise the Court concludes prima facie that the judgment is satisfied and extinct; yet, however, it will grant a writ of ~~fieri~~ scire facias, in pursuance of the staute of Westminster 2, 13 Edw. 1 c. 45, for the defendant to show cause why the judgment should not be revived, and execution had against him; to which the defendant may plead such matter as he has to allege in order to show why process of execution should not be issued; * * * * *" (3 Blackstone, 421.)

2 Freeman on Judgments, 4 Ed., Sec. 464.

2 Black on Judgments, Secs. 992-3-4.

The New Mexico Act of 1887, p. 213, extended the time within which execution might issue to keep a judgment alive without reviving the same, from a year and a day to five years. This act is as follows:

"Sec. 3085. That hereafter it shall not be necessary to bring proceedings in any Court to revive a judgment having been already obtained before a court of competent jurisdiction in this territory, except in cases where such judgment had been rendered for a period of five years or more next preceeding the issue of final process for the enforcement of the same.

"Sec. 3086. An execution may issue at any time, on behalf of any one interested in such judgment referred to in the above section, within five years after the rendition thereof, and without the necessity of bringing an action to revive the same."

Sections 3085 and 3086 of the Compiled Laws of 1897; Act of 1887.

Unless, then, the act of 1891, supra, quoted above, which provides that actions founded upon any judgment may be brought within seven years, and not afterwards, when read in connection with section 1860 of the Compiled Laws, prescribing the time within which suits and actions may be brought, includes a proceeding by scire facias to revive a judgment, the plea of the defendant, that judgment had been rendered nearly ten years before the suing out of the writ of scire facias, was not good and the demurrer should not have been overruled.

Is a proceeding by writ of scire facias an action or suit within the meaning of these statutes? Plaintiff in error contends it is but a continuation of the original action and is not the bringing of a new suit.

"A scire facias * * * is in general founded on a recognizance or judgment: Upon the former, it is

an original proceeding; but upon a judgment, it is only a continuation of the former suit: * * * this is not a new action, but a continuation of the old one; it is only a scire facias to revive the former judgment: * * *" 2 Tidd's Practice, side paging, 1136, and cases cited in note A.)

In speaking of a scire facias to revive a judgment, the same author, pages 1102-3, says:

"But if the plaintiff, after he had obtained judgment in a personal action, had lain by, and taken no process of execution within the year, he was put to a new original upon his judgment, and no scire facias was issuable; because there was not a judgment for any particuar thing in the personal action, with which the execution could be compared: Therefore, after a reasonable time, which was a year and a day, it was presumed to be executed, and the law allowed him no scire facias, to show cause why there should not be execution; but if the party had exceeded his time, he was put to his action on the judgment, and the defendant was obliged to show how the debt, of which the judgment was evidence, was discharged. (e)

To remedy this and make the modes of proceeding more uniform in both actions, the statute of Westm. 2, (13 Edw. 1.) stat. 1, c. 45, gave a scire facias to the plaintiff in a personal action to revive the judgment, when he had omitted to sue execution within the year after judgment was obtained. (a) The words of the act are, "that those things which are found enrolled before them that have the record, or contained in fines, whether they be contracts, covenants, obligations, services or customs, recogniz-

ances, or other things whatsoever enrolled, to which the King's court may lawfully give effect, from henceforth shall have such force, that hereafter it shall not be necessary to implead upon them: But when the plaintiff comes to the King's court, if the recognizance of fine levied be recent, that is to say, levied within the year, he shall forthwith have a writ of execution of the same recognizance. And if perchance the recognizance were made, or fine levied of longer time past the sheriff shall be commanded, that he make known to the party of whom the complaint is made, that he be before the justices at a certain day, to show if he has anything to say, why such matters enrolled, or contained in the fine, ought not to be executed And if he do not come at the day, or come and can say nothing why execution ought not to be made, the sheriff shall be commanded to cause the thing enrolled, or contained in the fine to be executed." But notwithstanding this statute, the plaintiff may still proceed, if he think proper, by action of debt on the judgment.

The reason why plaintiff is put to his scire facias after the year is because when he lies by so long after judgment, it shall be presumed that he hath released the execution; and therefore the defendant shall not be disturbed, without being called upon, and having an opportunity in court of pleading the release, or showing cause, if he can, why the execution should not go: (b) And it is said, that if the plaintiff delay executing a writ of inquiry till a year after interlocutory judgment, he cannot do it after,

without a scire facias. (c) The year must be computed from the day of signing judgment; (d) and the year depending upon the statute 13 Edw. 1, c. 45, the words of which are "infra annum," is to be reckoned by calendar months, and not by terms. (ee) And if the plaintiff sue a scire facias within a year after the judgment, he cannot afterwards have a capias ad satisfaciendum within the year, till he hath a new judgment in the scire facias. (f)

The general rule, however, that the plaintiff cannot take out execution after the year without a scire facias, must be understood with the following restrictions. When a fieri facias or capias ad satisfaciendum is taken out within the year, and not executed, a new writ of execution may be sued out at any time afterwards, without a scire facias: * * *"

See also page 1105, et seq., same author, where the subject is fully treated; and to the same effect 3 Blackstone, p. 421.

After quoting at length from authorities, 2 Freeman on Judgments, section 442 and subsequent sections, says: "Scire facias is sometimes spoken of as a new action. But the object sought and the result accomplished by a scire facias to revive a judgment both show that it is not a new action, but merely a continuance of an old one; no cause of action beyond the old judgment can be asserted; no ground of defense anterior to the old judgment can be brought forward; no relief beyond that embraced in the old judgment can be obtained; and finally the judgment entered upon the scire facias is simply "that the plaintiff have execution for the judgment mentioned

in the said scire facias, and costs"; * *

21 Am. & Eng. Ency. of Law, First Ed.), 855-6-7.

18 Ency. of Pl. & Pr., 1059, 1060.

This Court has expressly held that under a statute similar to 8 and 9 William III, scire facias to revive such a judgment is not a new action but a continuance of the old.

McKnight v. Craig, 6 Cranch, 183.

Also in Davis v. Packard, 7 Peters, 286, it says: "A scire facias upon a judgment is for some purposes only a continuation of the former suit, but an action of debt on a judgment is an original suit."

Davis v. Packard, 7 Peters, 286.

See also:

Lee v. Giles, 1 Bailey Law, 449; 21 Am. Dec., 476, and note.

Coomb v. Jordan, 3 Blands Ch., 284; 22 Am. Dec., 271.

See especially note by Freeman to Frierson v. Harris' Heirs, 94 American Dec., 223, for a discussion of the nature of the writ when used to revive a judgment.

It was expressly held not to be a new suit in

Fitzhugh v. Blake, 2 Cranch C. C., 37; 9 Fed. Cases, No. 4840.

The Circuit Court of Appeals for the Eighth Circuit has expressly passed on this question since this case was decided in the Supreme Court of New Mex-

.co. Sanborn, judge, said:

"The proceeding by writ of scire facias to revive a personal judgment is statutory. It had its origin in the statute of Westminster II (13, Edw. 1, c. 45). It is not an original proceeding, but a mere continuance of the former suit,—a supplementary remedy to aid in the recovery of the debt evidenced by the original judgment. Adams v. Savage, 3 Salk., 321, 2 Bac. Abr., 508; McGill v. Perrigo, 9 Johns., 259; Humphreys v. Lundy, 37 Mo., 320, 323. Its purpose is not to raise the issue of the validity of the original judgment, but to offer the debtor an opportunity to show, if he can, that the former judgment has been paid, satisfied, or released, and, if he cannot, to avoid the statute of limitations against the judgments and its lien, if it have one, and to give the creditor a new right of enforcement from the date of the judgment of revival. Its effect, when it results in a new judgment, is to avoid the statute of limitations, to set it running again from the date of the judgment of revival, and to reinstate the old judgment, and any lien which it evidences, as of the date of the judgment of revival." Cooley, Bl. Comm. 3, 656; Walsh v. Bosse, 16 Mo. App., 231; Insurance Co. v. Hill, 17 Mo. App., 593; Fagan v. Bently, 32 Ga., 534; Farrell v. Gleason, 11 Clark & F., 702, 712. It is not a substitute for the action of debt upon the judgment, but is an independent, concurrent remedy, of which the creditor may avail himself, regardless of such an action. Until payment of the debt has been enforced, he may prosecute his action of debt and his proceeding by scire facias at the same time, and the pendency of the one is no defense to the other. "Coke, Inst., 472; Carter v. Coleman, 34 N. C., 274; Lambson v. Moffett, 61 Md., 426, 431."

Lafayette County v. Wonderly, 34 C. C. App. Rep., 360; 92 Fed. Rep., 314.

The following addit.onal authorities ail hold that a scire facias is a continuance of the original action, some of them use the experession "proceeding in the or.ginal suit" in distinction to the briging of a new action of debt, based on the judgment already rendered.

Smith v. Stevens, 133 Ill., 183.
Bankers' Life Ins. Co. v. Robbins, 59 Neb., 170.
Comstock v. Holbrook, 16 Gray., 11.
Humphreys v. Lundy, 37 Mo., 320.
Dickey v. Craig, 5 Paige, 283.
McGill v. Perrigo, 9 Johns., 259.
Ingram v. Lelk, 2 Strobhart's Law, 207: 47 Am. Dec., 591.
Irvin v. Nixon's Heirs, 11 Pa. St., 419

III.

WHAT IS THE PROPER CONSTRUCTION OF THE STATUTE?

It clearly follows that if a scire facias is a proceeding in the original suit, and is not the commencement of a new suit, that it is not within the terms of the statute limiting "actions" on judgments to seven years.

The original action must be considered to have been pending ever since the judgment was rendered, unless the statute expressly barred it. Without such an express statute, it would remain in force for the pupose of issuance of scire facias for the full common law period of twenty years.

The act of 1891 is a substitute for section 1861 of the Compiled Laws of 1884, and is to be construed as a part of the chapter in which section 1861 occurs. It provides a statute of limitations for actions on judgments rendered in the Territory, and makes the period of limitation for actions on all judgments, Territorial or Extra-Territorial, seven years.

The filing in the proper clerk's office of the petition declaration, bill or affidavit, upon which process is authorized by law to be issued, shall be deemed the commencement of an action. The process, and all the process, sought by a scire facias proceeding to revive a judgment, is an execution of the original judgment. Under the authorities it is merely a continuation of the original suit, only a mere concluding part, having its foundation solely upon the judgment in the original action and in no sense an action in itself. It is a step in the original action, necessary, before an execution ~~can~~ *can* issue. The judgment rendered upon the scire facias is simply "that the plaintiff have execution for the judgment mentioned in the said scire facias and costs."

2 Freeman on Judg., Sec. 442, and cases cited in note 1, page 764.

In 2 Tidd, 1102, in stating the reason why the statute, Westm. 2, giving the remedy of scire facias, was passed, it is said, that before the enactment of that statute if a year and a day was allowed to pass the judgment was presumed to be executed "and the law allowed him no scire facias to show cause why there should be no execution; but if the party had ex-

ceeded his time he was put to his action on the judgment," thus drawing clearly the distinction between the scire facias and an action on the judgment. The very statute itself of Westm. 2, above quoted, referring to such records, says that they "from henceforth shall have such force that hereafter it shall not be necessary to implead upon them," showing that it was the purpose of the statute to provide a remedy by scire facias so that an action would not be necessary.

In addition to the above authorities, that a scire facias, quare executionem non, is not a new action, but merely a continuation of the old one, see Fitzhugh v. ~~Hoke~~ Blake, 2 Cranch, C. C., 37; 9 Fed. Cases, No. 4840 supra.

In Adams v. Rowe, 11 Maine, 89 (25 Am. Dec. 266), the distinction is clearly pointed out, as in the Common Law authorities above quoted, between scire facias whenever it is used to carry into effect a former judgment against a party to it, and scire facias against bail. The first "is not properly an action but a mere continuation of an action." The second scire facias, against bail, is a new action. See also Carter v. Carrigers Administrators, 24 Am. Dec., 585 (3 Yerger, 411).

In Irwin v. Nixon's Heirs, 51 Am. Dec., 562 (11 Pa. St., 419), speaking of the decision of the Court below, it is said: "So far from the Court being correct in this important particular, it unfortunately happens that it is a common, plain and familiar principle, that a scire facias, to revive a judgment post annum et diem, is but a continuation of the original

action, and the execution thereof is an execution on the former judgment."

See also note to Fetterman v. Murphy, 28 Am. Dec., 734; 4 Watts, 424.

It is easy to quote cases of scire facias against bail holding that it is a new action; but, as above pointed out in the quotations from Freeman, Sec. 442, and other authorities cited, to speak of it as a new action when used to revive a judgment is not correct. The Court below and counsel for defendant in quoting authorities seem to have fallen into error in confusing scire facias against bail with scire facias qua re executionem non. In the first, of scire facias against bail, the defendants were not former parties to the suit, but are made so by the scire facias, and the judgment is different.

From the authorities above cited it clearly appears that the revival of a dormant judgment by scire facias is not the bringing of a new action but merely the continuation of an old one in which a judgment was rendered. A party could, however, if he saw fit, bring a new action in debt, and the statute of Westminster 2, authorizing a scire facias, was to avoid the necessity of bringing such new action; and it follows that the legislature may have limited the time within which he could bring a new action without taking away the remedy by scire facias.

The statute does not expressly provide that no scire facias shall be had, or that no execution shall issue after seven years. The Territorial Supreme Court concludes that because the act of 1887, Com-

piled Laws of 1897, Sec. 3086, provided that an execution could issue at any time within five years, instead of a year and a day as at common law, and used the words "without the necessity of bringing any action to revive the same," that therefore the word "action" in the subsequent legislation of 1891 should be held to include a scire facias. This does not follow. This statute was meant to extend the time for the issuance of an execution. The Court then proceeds to argue that a scire facias is a separate action. It quotes some authorities so holding. But it is opposed to the decisions of this Court and the great weight of authority, and generally rests upon some peculiar statute.

See

Lafayette Co. v. Wonderly, 34 C. C. A., 360; 92 Fed. Rep., 314.

Davis v. Packard, 7 Peters, 286, supra.

The Court also fell into error in its construction of the decision of this Court in the case of Ross vs. Duval, 13 Peters, 45. It quotes the case as authority for the proposition that a scire facias is barred by a statute only barring actions on judgments. The Virginia statute being construed by the Court, expressly provided that "Judgments in any Court of record within the commonwealth, where execution hath not issue, may be revived by scire facias, or an action of debt brought thereon within ten years next after, and not after," &c. It expressly barred scire facias after ten years. The statute also allowed, at-

ter an execution had issued, or no return had been made, other executions at any time within ten years, and not after.

Ross v. Duval, 13 Peters, 59.

The Court held that neither execution nor scire facias could issue under this statute after the lapse of ten years. Both were expressly barred. There is nothing in the case that sustains the opinion of the Court below. It is an authority in favor of appellant. It showed the necessity for a provision barring scire facias, otherwise it could be sued out at any time within the common law period of twenty years.

IV.

General statutes of limitation do not bar the writ of scire facias, unless expressly mentioned therein.

This statute is a substitute for section 1861 of the Compiled Laws of 1884, quoted supra. It should be construed as a part of the Chapter in which the section for which it was substituted occurred, and especially in connection with the next preceeding section, quote supra. It provides a statute of limitations for actions on judgments rendered in the Territory, as well as for those rendered outside of the Territory. It bars actions on all judgments, wherever rendered, in seven years, under the New Mexico statute.

Section 2920 of the Compiled Laws of N. M., 1897, is as follows:

"The filing in the proper clerk's office of the petition, declaration, bill or affidavit, upon the filing of

which process is authorized by law to be issued, with intent that process shall issue immediately thereupon, which intent shall be presumed, unless the contrary appear, shall be deemed a commencement of the action."

Sec. 2920 Comp. Laws of N. M., (1897).

This was in force prior to the enactment of section 2914, supra, in 1861, and is a part of the same chapter, and the two are to be construed together. The writ of scire facias issues on a praecipe—an execution issues upon a mere request to the clerk. This statute very much more clearly shows what the legislature meant by "action" than the separate and distinct statute extending the time for issuance of execution from a year and a day to five years.

Section 3086, supra.

9 New Mexico, 323.

The process, and all the process, sought by a scire facias proceeding to revive a judgment, is an execution of the original judgment.

General statutes of limitations do not include scire facias by use of the term "action."

The Supreme Court of Washington said, in a case where the proceeding to revive a judgment was demurred to, on the ground that no judgment had been entered within six years prior to the filing of the motion to revive:

"We are of the opinion that the proceeding prescribed by statute to revive the lien of a judgment is not the commencement of an action, but only a mode by which to secure the fruits of an action already had and determined between the parties, and that section 27 of the Code is not applicable thereto. 5 Wait,

Act. & Def., 641-643; Murch v. Moore, 2 Or., 189; Tyler's Ex'rs. v. Winslow, 16 Ohio St., 364."

Burns v. Conners, 1 Wash, Stat., 6; 23 Pac. Rep., 837.

The Supreme Court of Alabama has decided that although the judgment may be revived, the right to bring an action on it, is not extended beyond the six years limitation from the date of entering the original judgment. It says:

"The order to revive does no more than reinvest the plaintiff with the right to have execution on his original judgment. His cause of action against the defendant is the original judgment, not the order to revive. * * * The common law right to sue on the judgment is not enlarged or made to accrue anew by force of the order. This Court has recently decided that the date of the accrual of the common law cause of action on the judgment is not postponed by the issue of executions under the statuate. Field v. Sims, 96 Ala., 500; 11 South. Rep., 763. It is plain that a new lease of life is not given to that cause of action by merely affording to the plaintiff the opportunity of resorting to the cumulative and independent remedy for the enforcement of judgment by means of executions upon it. As the plaintiff's right to maintain the suit must be rested upon the original judgment, and not upon the order to revive, and as nearly eight years had elapsed from the date of the entry of that judgment, the suit was barred by the statute of limitations of six years."

Marx v. Sanders, 98 Ala., 500; 11 South. Rep., 764.

The Supreme Court of New York, in a very similar proceeding, held that the ordinary statute of limitations did not apply.

Maples v. Mackey, 89 New York, 148.

The Supreme Court of Nebraska, in a well considered case, said:

"We will now inquire whether the Court was justified in making the order of revivor more than four years after Morrow died, and more than five years after the issuance of an execution on the judgment. The statutory proceeding to revive a dormant judgment is a substitute for the common law writ of scire facias. It is not the commencement of a civil action, but the continuation of an action previously commenced. The object in view is not to obtain a judgment, but to obtain permission of the Court to execute a judgment already in existence. Eaton v. Hasty, 6 Neb., 419; Irwin v. Nixon's Heirs, 11 Pa. St., 425; Rice v. Moore, 48 Kan., 590, 30 Pac., 10; Freem. Ex'ns (1st Ed.) Sec. 81. Clearly, then, the general limitation law which prescribes the time within which civil actions shall be commenced, has no application to the revivor of judgments."

Bankers' Life Ins. Co. v. Robbins, 59 Neb., 170; 80 N. W. Rep., 485.

See also:

Hunter v. Leahy, 18 Neb., 80.

The Supreme Court of Missouri has said of scire facias: "It is not the commencement of an action to which the statute of limitations can be pleaded."

Humphreys v. Lundy, 37 Mo., 323; citing,
Brown v. Byrd, 5 Eng., (Ark.) 533.
Evans v. White, 7 Eng. (Ark.) 33.

The Supreme Court of Ohio, in construing a statute of limitations with reference to domestic judgments, has said:

"It can hardly be supposed that, without any specific provision to that effect, it was understood that the merging of a cause or right of action, as ordinarily understood, in a judgment, was the accruing of a cause of action. Surely the object of adjudicating a claim or 'cause of action' and the rendition of judgment thereon is not to mature, or 'accrue' a right of action, but to terminate a cause of action in a judgment finally determining the rights of the parties, and to secure the remedies that follow a judgment. Undoubtedly a judgment is a cause or right of action of the highest nature, and that such action accrues when the judgment is rendered; but its objects and purposes are ordinarily so foreign to the mere maturity or accruing of a right of action, that it would be deemed singular to speak of the rendition of a judgment merging an adjudicated claim, as the accruing of a cause of action; and, especially would this be so, in relation to a domestic judgment, where the only purpose of obtaining it may be the remedies that follow.

"We think that the view we take of this statute, as applied to a domestic judgment, harmonizes with the general construction given to it by the bar of this state for more than thirty years and now to give it effect beyond the ordinary import of the language and terms employed in it, would make it a snare as well as a statute of repose."

Tyler's Ex'rs. v. Winslow, 15 Oh. St., 369.

This language is quite appropriate to the effort to construe this statute as barring by implication the very remedies, the rendition of the judgment gave the judgment plaintiff.

In Montgomery v. ~~Peay~~ Brittin, 23 Ark., 322, it was expressly held that the statute of limitations in regard to actions on judgments did not apply to scire facias to revive.

Montgomery v. Britt, 23 Ark., 322.
Brandy v. Peary 23 Pa. 172.

The Supreme Court of New Mexico was in error as to nearly every case cited in its opinion. Greenway v. Dare, 6 N. J. Law, 306, was not a scire facias to revive a judgment at all. It was a proceeding under a statute. An examination of the case will show that it was a proceeding to obtain a judgment on a verdict, rendered on a plea of set off in favor of the defendant. It was not based on a judgment at all. Murch v. Moore, 2 Ore., 189, also referred to, is an authority directly in point to the effect that a general statute of limitations is no bar to scire facias to revive a judgment. We submit that an examination of the authorities will show few cases holding that a statute of limitations barring actions on judgments, also bars scire facias to revive. We have already called attention to the Virginia statute and the Court's error as to the decision in

Ross v. Duval, 13 Peters, 45.

V.

Statutes of limitations barring remedies, or actions, are restricted to the cases falling expressly within their terms, and will not be extended by implication.

Sutherland on Stat. Cons., 368.

Endlich on Inter. of Stat., Sec. 343, where it is said:

"Statutes of limitations are to be strictly construed." There may not necessarily be any moral wrong in setting up the defense of lapse of time, but it is the creature of positive law, and is not to be extended to cases which are not strictly within the enactment (and therefore not to be extended to cases not within their words, though possibly within their reason, nor to be construed most pre-judicially to the

right they limit;) while provisions which give exceptions to the operation of such enactments are to be construed liberally. (Although such statutes, being repose, are not tobe evaded by construction, and consequently, though in terms applicable only to actions, apply to all claims that may be the subject of actions, however, presented, falling within their intended operation, yet they cannot be made to apply to a cause of action not embraced within their intention by presenting it in a form of action to which, in terms it is made applicable, the nature of the cause of action, not the form, determining the applicability of the statutes."

Endlich on Inter. Stat., Sec. 343: citing

Elder v. Bradley, 2 Sneed, 247, where it is said:

"It is a hard and rigorous rule, which, from motives of policy, the legislature has thought proper to declare, and while it is of course the duty of the Courts to enforce it, it is not their duty to give it that construction which will be most to the prejudice of those whose remedies and rights are to be forfeited by it but in favor of the right, which in all such cases is in peril."

In 115 U. S., 626, the Court quotes from Townsend v. Jemison, 9 How., 407, with approval: "The rule in the United States Courts in respect to pleas of the statute of limitations has always been that they strictly effect the remedy and not the merits."

Campbell v. Holt, 115 U. S., 626.

Townsend v. Jemison, 9 How., 407.

13 Am. & Eng. Enc. of Law, 703.

See also:

Hauenstein v. Lynham, 100 U. S., 488.

"If a party has a right to several actions, one is not necessarily barred because the others are."

13 Am. & Eng. Enc. of Law, 691.

"If an injured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been."

Lamb v. Clark, 23 Mass., 198.

See also:

McDonald v. McDonald, 8 Yerg., 145.

Wood on Limitations, 112.

Bedford v. Brady, 10 Yerg., 350.

The two remedies are distinct. In Carter v. Coleman, 12 ~~Freed.~~ Sneed., 174, it is held that an action of debt to recover the amount of a dormant judgment, or a scire facias to revive it, may both be pending at the same time, and a judgment on the scire facias cannot be pleaded in bar of the action of debt.

It follows therefore, that although the statute may have barred plaintiff's right to bring a creditors' bill on this judgment, or sue upon it in any independent action, nevertheless, his right to revive the judgment by scire facias would not be taken away unless the statute expressly so provided.

The Court was in error in the construction given to this statute, and the case should be reversed.

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